SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1975
No. 75-775

MILTON J. SHAPP, Individually and as Governor of the Commonwealth of Pennsylvania, WILLIAM H. WILCOX, Individually and as State Fuel Allocation Officer of the Commonwealth of Pennsylvania, ROBERT P. KANE, Attorney General, Commonwealth of Pennsylvania, and the COMMONWEALTH OF PENNSYLVANIA, for Itself and on Behalf of Its Residents and Citizens,

Petitioners

v.

FRANK C. ZARB, Administrator, Federal Energy Office; JOHN W. WEBER, Assistant Administrator for Operations and Compliance, Federal Energy Office; JOSEPH A. LA SALA, Regional Administrator, Region III, Federal Energy Office; FEDERAL ENERGY OFFICE; ATLANTIC RICHFIELD CORPORATION; EXXON CORPORATION; SUN OIL COMPANY, INC.; GULF OIL CORPORATION; MOBIL OIL CORPORATION; TEXACO, INC.; AMOCO OIL COMPANY; ASHLAND OIL, INC. B P OIL CORPORATION; BP OIL, INC.; UNITED REFINING COMPANY; PHILLIPS OIL COMPANY; GETTY OIL COMPANY (EASTERN OPERATIONS); AMERADA HESS CORPORATION; CITIES SERVICE OIL COMPANY; AGWAY PETROLEUM CORPORATION; CHEVRON OIL COMPANY; PENNZOIL COMPANY; SHELL OIL CO.; CONTINENTAL OIL COMPANY; UNION OIL COMPANY OF CALIFORNIA; CROWN CENTRAL PETROLEUM CORPORATION; CHAMPLIN PETROLEUM COMPANY; CLARK OIL & REFINING CORPORATION; TEXAS CITY REFINING, INC.; PETROLEUM MARKETING CORPORATION; KERR-McGEE CORPORATION,

Respondents

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Milton J. Shapp, Governor, et al., petitioned the Supreme Court to issue a writ of certiorari to review the judgment of the court of appeals in the above-captioned matter. In response thereto, the Solicitor General filed a Memorandum For the Federal Respondents in Opposition, in which it is asserted that the petition should be denied

on the ground that "the only question presented is whether this case is moot (and) [t]hat question does not warrant review by this Court." Memorandum at 3. The Solicitor General further contends that the instant controversy is moot.[1] That the issues raised in the petition do represent questions appropriate for review by the Supreme Court already has been set out at length in the petition (at 8-18), and will not be reiterated herein. The purpose of this memorandum is to respond to the contentions of the Solicitor General that the instant controversy has been rendered moot by the alleged changes in the "regulatory framework" due to the enactment of the Emergency Policy and Conservation Act (EPCA), Pub. L. 94-163, 89 Stat. 871.

The history of the legislation extending the Emergency Petroleum Allocation Act of 1973 (EPAA) has been set forth both in the petition (at 13-15) and the Solicitor General's Memorandum (at 2). The parties are in agreement that the EPAA has continued in full force and effect through December 15, 1975. Nevertheless, the Court of Appeals held, on September 17, 1975, that:

> "This controversy has now been rendered moot by the expiration of statutory authority for the entire program of federal control and allocation of petroleum products." *Shapp v. Simon*, 523 F.2d 1405, 1407 (TECA 1975).

In enacting the EPCA, Congress merely amended the EPAA and extended it as amended through September 30,

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[1] The Solicitor General's contention at pages 5-6 that the petitioners have failed to exhaust an allegedly adequate administrative remedy was neither before the Court of Appeals nor is it presently before the Supreme Court.

1981.[2] It is submitted that the EPAA never did expire and that the two statutes must now be read in pari materia.[3]

The President's authority to deal with shortages of petroleum products or dislocations in their national distribution system was established in the EPAA (15 U.S.C. §751). Section 4(a) provides a scheme prescribing the President's power to promulgate "a regulation providing for the mandatory allocation of" petroleum products in the amounts and at the prices specified in the regulation, 15 U.S.C. §753. Section 4(b)(1)(F) mandates that the regulation under Section 4(a) shall provide for the "equitable distribution of (petroleum products)[4] at equitable

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[2] See Sections 451, 453 and 461, EPCA. See also Federal respondents' brief at 2.

[3] At the very least, petitioners respectfully request that this Court vacate the order of the Temporary Emergency Court of Appeals and remand the action to TECA for reconsideration in light of the recent statutory enactment.

[4] The federal respondents make the following assertion:

> "To order more gasoline to be allocated to Pennsylvania now would not meaningfully compensate Pennsylvania residents for any injury caused by a shortage of gasoline during March 1974. Current allocations, which are based on current supply, are greater than current petroleum consumption. There is therefore no equitable basis for the injunctive relief petitioners request, and the case is moot." (Respondents' brief at 3).

This contention fails for a variety of reasons, the most obvious of which is that this assertion is not a matter of record. Even, assuming *arguendo* that current gasoline supply does exceed demand, there currently exists shortages of other petroleum products. An order of court allocating more of those products to Pennsylvania would "meaningfully compensate Pennsylvania's residents" as well as Pennsylvania itself. Finally, the lower court upon remand and hearing could fashion such equitable relief as to either place

prices among all regions and areas of the United States . . . and among all users." 15 U.S.C. §753(b) (1) (F). While the EPCA has amended various provisions of the original act, the basic statutory scheme and purpose of the EPAA remains in effect today. The public policy objectives contained in Section 4(b) (1) (F) of the EPAA were extended by Congress in Section 451 of the EPCA.

The Joint Explanatory Statement of the Committee Conference (hereafter, "Conference Report") clarifies any ambiguity which may exist as to whether Congress intended to carry forward the objectives of the EPAA,[5] the noncompliance with which resulted in an inequitable allocation of petroleum products to the Commonwealth of Pennsylvania. The Conference Report explains that the EPCA "is designed to . . . insure that available supplies will be distributed equitably in the event of a disruption in petroleum imports." 121 Cong. Rec. H 12,125 (daily ed. Dec. 19, 1975). More specifically, it provides that the EPCA "extends the basic petroleum allocation authority contained in the Emergency Allocation Act . . . ." 121

Pennsylvania in as good a position as it would have been but for its injuries, or, alternatively, provide additional allocations to Pennsylvania as protection against future shortages.

[5] Congressman Dingell, Co-Chairman of the Conference, remarked:

> "This legislation would extend the Emergency Petroleum Allocation Act and provide a mechanism to convert today's mandatory controls to standby authority. A number of direct authorities are given to the President to augment his existing powers under the Allocation Act to respond effectively to a severe energy supply interruption and to provide for the attainment of the public policy objectives identified in that act."

121 Cong. Rec. H 12,593 (daily ed. Dec. 15, 1975).

Cong. Rec. H 12,126-7 (daily ed. Dec. 19, 1975); 121 Cong. Rec. S 22,480-1 (daily ed. Dec. 17, 1975).

The substantiality and importance of the questions presented in the petition have not been denied. The federal Respondents merely assert that this action is moot, an assertion which is incorrect for the foregoing reasons.[6] It is therefore respectfully submitted that this Court should grant the petition for writ of certiorari in this case to review the judgment of the courts below.

Respectfully submitted,

LAWRENCE SILVER,
HOWARD M. SNYDER,
Deputy Attorneys General

ROBERT P. KANE,
Attorney General

Counsel for Petitioners.

Dated: February 10, 1976

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[6] The federal respondents have failed to cite a single provision of the EPCA which in any way suggests that a cause of action arising out of violations of the EPAA has been rendered moot by the amendments to that Act.